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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1318

DREW MUNICIPAL SEPARATE SCHOOL DISTRICT, *et al.*,
Petitioners,

v.

KATIE MAE ANDREWS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE FOR THE NATIONAL EDUCATION ASSOCIATION

STEPHEN J. POLLAK
MARTIN J. FLYNN
RICHARD M. SHARP
734 Fifteenth Street, N.W.
Washington, D.C. 20005

DAVID RUBIN
1201 Sixteenth Street, N.W.
Washington, D.C. 20036

Attorneys for Amicus Curiae
National Education Association

Of Counsel:

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005

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MOTION OF THE NATIONAL EDUCATION ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The National Education Association ("NEA") hereby moves, pursuant to Rule 42 of the Rules of this Court, for leave to file the attached brief amicus curiae on the merits of the case at bar. Respondents have consented to the filing of this brief, but petitioners have withheld their consent.

NEA is a voluntary organization of educators. Its membership consists of approximately 1.7 million persons, most of whom are employed in public school systems.

NEA's members have a substantial interest in the case at bar, for it involves the extent to which school authorities may intrude upon the liberty and privacy of teachers and, more specifically, whether such authorities may bar a teacher from employment because of the teacher's family or marital status. In addition, this case presents issues relating to whether school administrators may establish rules which, while not demonstrably related to effective classroom performance, severely disadvantage blacks and females who are otherwise qualified to work in the public schools.

There is a threshold issue in this case that, so far as we can determine, will not be briefed by the parties. That question is whether this Court should dismiss the writ of certiorari as improvidently granted. As we show in the attached brief, Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, and Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, as implemented by recent regulations of the U.S. Department of Health, Education and Welfare, serve as standards for determining the lawfulness of rules barring the employment of unwed parents. Because (1) these federal statutory standards must be met by petitioners and the other public school districts of the nation regardless of this Court's disposition of the constitutional issues at bar, and (2) there is no conflict among the circuits on the constitutional issues, we urge the Court to dismiss its writ of certiorari. Alternatively, we ask this Court to affirm the judgment below on the basis of HEW's supervening Title IX regulations.

In addition, NEA believes that it can be of service to the Court in assessing the validity of petitioners' "role model" theory offered here in justification of the rule at issue and in formulating a standard that, while protecting the legitimate interests of school authorities, would help to ensure that school policies do not unduly intrude upon the personal lives of teachers.

Wherefore, NEA requests that this Court grant leave to file the accompanying brief amicus curiae in support of the judgment below.

Respectfully submitted,

STEPHEN J. POLLAK
MARTIN J. FLYNN
RICHARD M. SHARP
734 Fifteenth Street, N.W.
Washington, D.C. 20005

DAVID RUBIN
1201 Sixteenth Street, N.W.
Washington, D.C. 20036

Attorneys for Amicus Curiae
National Education Association

Of Counsel:

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005

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BRIEF AMICUS CURIAE FOR THE NATIONAL EDUCATION ASSOCIATION

ARGUMENT

I. INTRODUCTION AND SUMMARY

This case arises because the Superintendent of the Drew Municipal Separate School District learned in the Spring of 1972 that an unwed mother of an illegitimate child had had the "audacity" to apply to the school district for a job as a teacher's aide (Pettey, 10, 29).[1] In

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[1] Reference is to the testimony of Superintendent George Pettey at pages 10 and 29 of the transcript of the trial proceedings on March 16, 1973. Our citations to testimony consist of the witness' name followed by the appropriate page of the deposition or trial transcript. Because neither the original record nor an appendix were filed in this Court prior to or during the briefing schedule,

response the superintendent orally decreed that no unwed parent of an illegitimate child could (1) be employed by the school district in any position entailing direct contact with students, or as he later elaborated, (2) serve the school as a secretary, social worker, cafeteria worker, school volunteer, nurse or PTA president (Pet. App. 5 & n.2, 23 n.8). On the basis of this unwritten rule, the superintendent's subordinates terminated the employment of three in-service teacher's aides and one substitute teacher, and rejected the application of one person seeking a job as a teacher's aide (Pet. App. 21 n.6, 22 n.7, 23 n.8). All of these affected persons are black and all are female (*id.*). Two of them, respondents Andrews (the applicant) and Rogers (an in-service teacher's aide), initiated this action to enjoin the enforcement of the rule and prevailed in both courts below.

In section II of this brief, we urge the Court to dismiss its writ of certiorari as improvidently granted or to affirm the judgment below on the basis of recent federal regulations implementing Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.* As we show, the Court of Appeals' decision does not conflict with rulings of other federal courts. Moreover, insofar as this case turns upon the constitutionality of a rule that substitutes a conclusive presumption of unfitness for individualized decision-making respecting the employment of unwed parents of illegitimate children, it appears from the record that the rule is one of a kind.

In addition, we show that there are federal statutory standards which must be met by petitioners and other

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we have been unable to provide cites to the original record, as paginated by the clerk, or to review some portions of the record including the pleadings, exhibits and trial briefs.

The opinions of the Court of Appeals and the District Court are printed in the appendix to the petition for certiorari and are cited herein as "Pet. App." followed by the page reference. Petitioners' brief on the merits is cited as "Br."

school districts, irrespective of this Court's disposition of the constitutional issues at bar. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-2, requires school districts, *inter alia*, to establish that their employment criteria are demonstrably related to successful job performance if such criteria have a significant exclusionary effect on blacks or females. As the evidence in this record demonstrates, Drew's rule has excluded only female blacks.

The precepts of Title VII have been built upon and expanded in regulations which implement Title IX's prohibitions against sex discrimination by school districts receiving federal funds. Pursuant to Title IX, the Department of Health, Education and Welfare has established specific rules barring school districts from making marital, parental or family status a criterion of employment unless that criterion is "essential to successful operation of the employment function concerned." 40 Fed. Reg. 24144 (1975), §§ 86.57(a)(1) and (b), 86.60(a), and 86.61. These regulations also bar the use of employment criteria which have an adverse effect on the basis of sex unless such criteria are shown, *inter alia*, "to predict validly successful performance in the position in question" (*id.* at § 86.52(a)). Drew, as we show, cannot meet the standards required by the Title IX regulations.

HEW's regulations were approved by the President and cleared with the Congress prior to becoming effective on July 21, 1975. These regulations are applicable to Drew and approximately 16,000 other school districts irrespective of whether Drew's rule is constitutional. Thus, as we show, the regulations eliminate the need to decide the constitutional issues at bar, and this Court should either dismiss the writ as improvidently granted in light of the supervening change in law, *Rice* v. *Sioux City Cemetery*, 349 U.S. 70 (1955), or apply the super-

vening regulations to the case at bar and affirm the judgment below. *Thorpe* v. *Housing Authority*, 393 U.S. 268, 281-82 (1969). Cf. *Lau* v. *Nichols*, 414 U.S. 563 (1974).

In section III of this brief we show that Drew's rule unconstitutionally intrudes upon sexual, marital and familial freedoms secured to the individual by the Fourteenth Amendment's guarantee of liberty, for the rule is neither narrowly drawn nor supported by substantial justification. *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974); *Roe* v. *Wade*, 410 U.S. 113 (1973).

While Drew has finally abandoned the superintendent's claim that all unwed parents of illegitimate children are morally unfit (Br., pp. 4, 11; see Pet. App. 8-9 & n.7), it still maintains that all such parents are improper role models. In support of this hypothesis, Drew did not offer any evidence showing that the persons it employed and then terminated because of their parental status ever discussed this aspect of their private lives with students (Pet. App. 13, 32-33). Nor did Drew show that any school children knew that these persons were unwed parents of illegitimate children (*id.*). Having offered no proof on these critical factual matters, Drew presents a role model theory which is focused neither on the teacher's classroom behavior nor on conduct that is open and notorious. Under Drew's theory of role modeling school authorities may scrutinize any aspect of a teacher's private life and disqualify any teacher whose private conduct has not met the moral standards professed by the school authorities.

In contrast to Drew's sweeping view of role modeling, the experts who testified in this case made clear that a teacher cannot be a "model" for particular behavior or values unless the students, at a minimum, observe the teacher performing such behavior or espousing such

values or know that the teacher has done so. Drew's rule, however, purports to bar from school employment every person who has conceived an illegitimate child irrespective of whether the students are likely to know of such person's past or present marital and parental status. Thus, as we show, the rule is overbroad.

Furthermore, Drew's rule assumes that irrespective of what the unwed parent of an illegitimate child does or says in the classroom, students will indiscriminately choose to engage in premarital relations and to bear illegitimate children because an admired teacher has done so. As both lower courts found, such a hypothesis is "highly improbable, if not speculative" and "implausible" (Pet. App. 13, 33).

Finally, Drew's rule, far from being justified by educational considerations, has serious educational disadvantages. In barring unwed parents of illegitimate children from service in the schools as volunteer workers, PTA presidents, cafeteria workers, social workers, nurses, teacher's aides or teachers, the rule stigmatizes more than one-third of the children of Drew for being born out of wedlock and makes clear to their parents that they are unfit to engage in or publicly support school activities. It is difficult to conceive of sound education occurring in such a context.

In sum, we show that Drew's rule is overbroad and unsupported by any reasonable theory of role modeling and that the school district's professed goals, including prevention of schoolgirl pregnancies, can be better met by means less draconian than the rule at bar.

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II. THE COURT SHOULD DISMISS THE WRIT OF CERTIORARI AS IMPROVIDENTLY GRANTED OR AFFIRM THE JUDGMENT BELOW ON THE BASIS OF SUPERVENING FEDERAL REGULATIONS.

Recognizing that issuance of a writ of certiorari is a matter of sound discretion exercised by the Court without the benefit of the record below or briefs on the merits, amicus NEA sets forth facts and reasons not briefed to the Court by petitioners or respondents in their respective petition for certiorari and opposition thereto which, in our view, warrant dismissal of the writ as improvidently granted. Alternatively, we urge that the judgment of the Court of Appeals be affirmed on the basis of supervening regulations adopted by the Department of Health, Education and Welfare to implement Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681.

A. The Writ Of Certiorari Should Be Dismissed As Improvidently Granted In Light Of The Peculiar Facts Of This Case And Supervening Federal Regulations.

1. *Factors Making this Case a Poor Vehicle for Review*

First, there is no conflict among the circuits which would enhance the importance of deciding the issues presented in this case.[2] Rather, as the District Court stated, this case is one of novel impression (Pet. App. 24).

[2] We have found five cases involving issues somewhat similar to those in the case at bar. In *Doe* v. *Osteopathic Hospital, Inc.*, 333 F. Supp. 1357 (D. Kan., 1971), the court held that Title VII prohibited a private employer from dismissing an office employee because of her unwed pregnancy. In *Cirino* v. *Walsh*, 321 N.Y.S.2d 493, 495 (Sup. Ct. N.Y. County, 1971), the court, relying on *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971), held that barring an unwed Puerto Rican mother from the position of school crossing guard "is not only arbitrary, but illegal as discrimination against her because of race and sex." In *Reinhardt* v. *Board of Education*, 19 Ill.App.3d 481, 311 N.E.2d 710 (1974), the court, relying principally upon a state tenure law, held unlawful the dismissal of a teacher because of her unmarried pregnancy. In *Drake* v. *Board of Education*, 371 F. Supp. 974 (M.D. Ala., 1974), the court held that cancellation of an unmarried pregnant teacher's contract violated her right of privacy because the school board obtained this information from her physician without the teacher's consent. In *Wardlaw* v. *Austin Independent School District*, 10 FEP 892 (W.D. Texas, 1975), the Court upheld the transfer of a teacher to a non-teaching position because of her unwed pregnancy. The latter case does not conflict in holding or principle with the case at bar since the District Court in this case expressly reserved the question of what steps might be appropriate where an unwed teacher is demonstrably pregnant during the school year (Pet. App. 34). Cf. *Leechburg Area School District* v. *Commonwealth Human Relations Commission*, 339 A.2d 850 (Commonwealth Ct. Pa., 1975) (invalidating maternity leave policy which protected pregnant females who were married and punished those who were unwed).

Second, it appears that Drew's rule is one of a kind. The Attorney General of Mississippi advised the District Court that this "subject . . . had never appeared before in the State of Mississippi" (Transcript of May 31, 1973, p.12). Dr. Buchanan, who was formerly employed in four Mississippi school districts and is now dean of a Mississippi teacher-training institution, testified that unwed parenthood does not arise sufficiently often in teaching to warrant rulemaking (Buchanan, 29, 56). Dr. Kenneth Clark, Member of the New York Board of Regents, and Drs. Edmund Gordon and Ronald Samuda, both of Columbia Teachers College, had never heard of such a rule before (Clark, 27; Gordon, 4, 14; Samuda, 35). Thus, insofar as this case turns upon the constitutionality of a rule that substitutes a conclusive presumption for individualized decision-making respecting the employability of unwed parents, the case appears to be a sport.

Third, this case bristles with constitutional issues of broad importance, many of which were not considered by the Court of Appeals. Among the constitutional issues not addressed by that court are the following:

(1) whether the rule unconstitutionally intrudes upon respondents' freedom of choice in sexual, marital and familial relations, *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942); *Roe* v. *Wade*, 410 U.S. 113, 152 (1973); *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972); *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974);

(2) whether the rule, because of its significant disparate effect on blacks, constitutes racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment; cf. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971);[3] and

[3] In *Griggs* this Court held that where facially neutral selection criteria have an exclusionary effect on minorities, such criteria are discriminatory within the meaning of Title VII unless the criteria are shown to bear a demonstrable relationship to successful job performance. See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 n.14 (1973). Since *Griggs*, the courts of appeals almost uniformly have held that the prohibitions against discrimination embodied in the Fifth and Fourteenth Amendments incorporate the *Griggs* standard. *United States* v. *Chesterfield County School District*, 484 F.2d 70, 73 (4th Cir. 1973); *Walston* v. *County School Board of Nansemond County*, 492 F.2d 919, 924 (4th Cir. 1974); *Bridgeport Guard., Inc.* v. *Bridgeport Civil Service Commission*, 482 F.2d 1333, 1337 (2d Cir. 1973); *Castro* v. *Beecher*, 459 F.2d 725, 732 (1st Cir. 1972); *Davis* v. *Washington*, 512 F.2d 956 (D.C. Cir. 1975), *cert. granted*, 44 U.S.L.W. 3179 (Oct. 6, 1975); *Douglas* v. *Hampton*, 512 F.2d 976 (D.C. Cir. 1975); *King* v. *New York City Civil Service Comm'n*, 6 EPD ¶ 8999 (S.D. N.Y., 1973); *Fowler* v. *Schwarzwalder*, 351 F. Supp. 721, 724 (D. Minn. 1972). See particularly *Douglas* v. *Hampton*, *supra*, 512 F.2d at 981, which notes that "No court has distinguished the standard mandated by the Fifth and Fourteenth Amendments from that specified by Title VII of the Civil Rights Act of 1964"; and *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 n.14 (1973), where this Court relied not only on *Griggs* but also on two cases arising under the Fourteenth Amendment, *Castro* v. *Beecher*, 459 F.2d 725, 732 (1st Cir. 1972), and *Chance* v. *Board of Examiners*, 456 F.2d 1167, 1176 (2d Cir. 1972), for the proposition that where employment tests have an exclusionary effect on minorities "such requirements must be shown to bear a demonstrable relationship to successful performance of the jobs for which they were used." But see *Tyler* v. *Vickery*, 517 F.2d 1089 (5th Cir. 1975). See also *Cirino* v. *Walsh*, 321 N.Y.S.2d 493 (Sup. Ct. N.Y. County, 1971), where the court found that the rate of illegitimate births was significantly higher among Puerto Ricans than among whites and ruled, *inter alia*, that a decision to bar an unwed Puerto Rican mother from a position as a school crossing guard was racially discriminatory.

(3) whether the rule, because of its significant disparate effect on females, constitutes sex discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment; cf. *Frontiero* v. *Richardson*, 411 U.S. 677 (1973).[4]

2. *Federal Statutes and Regulations Bar Rules Which Absolutely Disqualify All Unwed Parents from Employment in the Public Schools.*

The special facts of this case make it, in our view, a poor vehicle for deciding the manifold constitutional issues presented. More significantly, however, recently enacted federal statutes and regulations—not applied below—will be dispositive of subsequent cases presenting issues similar to those at bar. Any need for adjudication of the constitutional issues presented by this case is significantly diminished, if not eliminated, by the broad remedial provisions of Title VII of the Civil Rights Act of 1964, as amended, and by Title IX of the Education Amendments of 1972, and HEW's regulations implementing Title IX.[5]

[4] See also *Cirino* v. *Walsh*, *supra*; *Reinhardt* v. *Board of Education*, 6 FEP Cases 235 (Ill. Cir. Ct. April 6, 1973), *aff'd on other grounds*, 19 Ill. App. 3d 481, 311 N.E.2d 710 (1974). Cf. *Leechburg Area School District* v. *Commonwealth Human Relation Commission*, 339 A.2d 850, 854 (Commonwealth Ct. Pa., 1975).

[5] In *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974), this Court noted that "[t]he practical impact of our decision in the present cases may have been somewhat lessened" by the supervention of Title VII and EEOC Guidelines bearing on mandatory pregnancy leave (*id.* at 639, n.8). The Court decided *La Fleur* "in order to resolve the conflict between the Courts of Appeals" (*id.* at 638). That ground is not present in this case (see p. 6, *supra*, and n.2).

(a) *Drew's Rule Violates Title VII's Prohibition Against Employment Policies Which Significantly Disadvantage Blacks or Women and Cannot be Shown to be Demonstrably Job Related or Justified by Business Necessity.*

Effective March 23, 1972, Congress amended Title VII to provide that public employers, as well as private employers, would be subject to the prohibitions of Title VII.[6] Pursuant to Guidelines established by the Equal Employment Opportunity Commission and applied by this Court in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), selection criteria which operate to exclude a significantly disproportionate percentage of minority group persons (such as females or blacks)[7] are presumptively discriminatory and cannot pass muster under Title VII unless the employer shows that the criteria are demonstrably job-related or justified by business necessity. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431-32 (1971); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 n.14 (1973); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 425 (1975).

In the wake of *Griggs*, Title VII has been applied to bar many varieties of facially neutral selection criteria which have a significant exclusionary effect on blacks or females when the employer cannot show that the selection criteria are justified by business necessity or are demonstrably related to successful job performance. Thus, policies barring employment to persons who have a record of arrests (*Gregory* v. *Litton System, Inc.*, 472 F.2d 631

[6] The complaint in the case at bar was filed on February 20, 1973. It does not allege that defendants' policies are contrary to Title VII. It does, however, allege that defendants' policies are racially and sexually discriminatory, thus presenting these issues in the context of the Equal Protection Clause (Pet. App. 4, n.1).

[7] Title VII prohibits discrimination on the basis of "race" or "sex." 42 U.S.C. § 2000e-2.

(9thCir. 1972)), a record of criminal convictions (*Green* v. *Missouri Pacific Railroad*, 523 F.2d 1290 (8th Cir. 1975)), or a record of two wage garnishments in the past twelve months (*Wallace* v. *Debron Corp.*, 494 F.2d 674 (8th Cir. 1974)) have been held to violate Title VII because no business necessity justified the significantly disproportionate impact of these policies on minority groups. Cf. *Doe* v. *Osteopathic Hospital, Inc.*, 333 F. Supp. 1357 (D. Kan. 1971) (Title VII held to prohibit a private employer from dismissing an office employee because of her unwed pregnancy).

There can be no doubt that Drew's rule barring unwed parents of illegitimate children has a significantly disproportionate impact on females and blacks. The record demonstrates that the rule has been applied to five persons—all female (Pet. App. 19, 21 n.6, 23 n.8). The superintendent acknowledged that the rule will bar significantly more females than males, for as he put it, "the unwed mother is stuck with the result" (Pettey, 24). As the Chief Justice observed in *Stanley* v. *Illinois*, 405 U.S. 645 (1972) (dissenting):

> "In almost all cases, the unwed mother is readily identifiable, generally from hospital records, and alternatively by physicians or others attending the child's birth. Unwed fathers, as a class, are not traditionally quite so easy to identify and locate. Many of them either deny all responsibility or exhibit no interest in the child or its welfare; and, of course, many unwed fathers are simply not aware of their parenthood" (*id.* at 665).

The disparate racial impact of the rule is also manifest. All of the rule's five known casualties are black (Pet. App. 19, 21 n.6, 23 n.8). Statistics compiled by the Public Health Service show that in 1971 in Mississippi, 8,600 black children as compared to only 794 white children were born out of wedlock.[8] Statistics for the

[8] Public Health Service, Dept. HEW, *Vital Statistics of the United States 1971, Vol. I—Natality*, p. 1-187 (Table 1-70).

32 states which report legitimacy data to the Public Health Service confirm the significant adverse racial impact of any rule which bars the progenitor of an illegitimate child from school employment.[9]

In a later section of this brief we show that Drew's rule is not supported by any substantial justification (see pp. 21-29, *infra*). It suffices to say here that the Courts below found that the rule could not satisfy the traditional, minimal standards of due process and equal protection. Unless all of the judges below were far wide of the mark, the rule cannot survive Title VII's more onerous standard.

(b) *Drew's Rule Violates Title IX and Recent Regulations Promulgated Pursuant Thereto.*

Pursuant to Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*, HEW recently promulgated regulations that explicitly deal with sexually discriminatory rules relating to the employment of teachers and other employees of a public school system (40 Fed. Reg. 24143 (1975), § 86.51, *et seq.*). These regulations have been approved by the President (40 Fed. Reg. 24128) and cleared by the Congress prior to becoming effective.[10] They became effective on July 21,

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[9] In the 32 states reporting legitimacy data to the Public Health Service for the year 1971, there were 1,778,918 births. Of this total, 1,445,638 newborn children were white and 295,558 were black. These states reported 206,772 illegitimate births. 80,296 of these illegitimate children were white and 121,570 were black. Public Health Service, *supra* note 8, p. 1-195 (Table 1-71).

[10] Pursuant to Section 509(a)(2) of the Education Amendments of 1974, 20 U.S.C. § 1232(d)-(f), regulations implementing Title IX must be submitted to both Houses of Congress at least forty-five days in advance of their effective date so that the Congress, by concurrent resolution, may disapprove such regulations if it finds that the regulations are "inconsistent" with Title IX. HEW's regulations were submitted to the Congress, as required (40 Fed. Reg. 24128, ¶ 3), and were not thereafter disapproved.

1975—thirty-one days after respondents filed their brief in opposition to certiorari (40 Fed. Reg. 24137, § 86.1). The regulations are applicable to approximately 16,000 elementary and secondary school systems in the nation, including the Drew Municipal Separate School District.[11] In contrast to the constitutional provisions involved in this case, HEW's regulations deal specifically with the complex of values involved in sex discrimination, employment and public education, and thus should be a primary point of reference for disposing of the issues at bar.

Title IX provides, *inter alia*, that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681.[12] Pursuant to this statute, HEW has

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[11] Secretary Weinberger stated in a press release on June 3, 1975, that "Title IX is indeed far reaching in its sweep. It forbids sex discrimination in any educational institution receiving Federal assistance. This includes the Nation's 16,000 public school systems and nearly 2,700 post-secondary institutions." This press release, together with other materials pertinent to the promulgation of the Title IX regulations, is contained in U.S. Dept. of HEW, "Final Title IX Regulation Implementing Education Amendments of 1972 Prohibiting Sex Discrimination in Education." See note 12, *infra*, which shows that Drew is a recipient of federal funds and thus is covered by Title IX.

[12] Title I of the Elementary and Secondary Education Act of 1965, as amended, 20 U.S.C. § 241a, is a major source of federal funding for local school districts. The record shows that Drew employs a "Title I Administrator" and a Coordinator of Elementary Instruction who operates under the Title I program (McCorkle, 5, 10, 32; Pettey, 10). The record also shows that teacher's aides were hired "under Title I" (Burnett, 25). See also HEW's most recent directory which lists Drew among the thousands of school districts required to report faculty and student data by race because they are recipients of federal funds and as such must comply, *inter alia*, with Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000-d. U.S. Dept. of Health, Education and Welfare, *Directory of Public Elementary and Secondary Schools in Selected Districts, Fall 1972*, pp. iii, 727, 1534.

promulgated regulations which sharply restrict school districts and other institutions of public education in making marital, parental or family status a criterion of employment. The regulations provide, *inter alia*, that:

> "A recipient shall not make pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is 'Miss or Mrs.'"
>
> • • • •
>
> "A recipient shall not apply any policy or take any employment action: (1) concerning the potential marital, parental, or family status of an employee or applicant for employment which treats persons differently on the basis of sex. . . ."
>
> • • • •
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> "A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom." 40 Fed. Reg. 24144, §§ 86.60(a), 86.57 (a)(1) and (b).

To be sure, the foregoing prohibitions are not absolute. They serve to identify prima facie forms of sex discrimination, and a school district may take action inconsistent with these rules. But, to do so, the school district must show that "such action is essential to successful operation of the employment function concerned" (*id.* at § 86.61).

In addition, the HEW regulations build upon Title VII's precepts[13] and bar facially neutral selection criteria which disproportionately exclude one sex unless the criteria are, at a minimum, demonstrably job related. Section 86.52 of the HEW Title IX regulations provides:

> "A recipient shall not administer or operate any test or other criterion for any employment opportunity which has a disproportionately adverse effect on persons on the basis of sex unless:
>
> (a) Use of such test or other criterion is shown to predict validly successful performance in the position in question; and
>
> (b) Alternative tests or criteria for such purpose, which do not have such disproportionately adverse effect, are shown to be unavailable" (40 Fed. Reg. 24143).

This regulation tracks the EEOC's Guidelines On Employment Section Procedures, 29 C.F.R. § 1607.3,[14] which were endorsed by this Court in *Griggs*, *supra*, 401 U.S. at 436.

This record illustrates the fact that any rule barring unwed parents from employment in the public schools almost certainly will exclude far more females than males (p. 11, *supra*). Thus, respondents or any other

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[13] HEW's explanation of Title IX's implementing regulations states that

> "Virtually all recipients subject to this Part 86 are also subject to title VII and many are also subject to the Executive Order [11246]. Except in the area of fringe benefits, where Subpart E of the title IX regulation differs from the title VII Sex Discrimination Guidelines of the EEOC, an employer who complies with the title IX regulation will generally be complying both with title VII and the Executive Order. It should be emphasized, however, that nothing in the title IX regulation alters any responsibilities that an employer may have under the Executive Order or title VII." 40 Fed. Reg. 24135 ¶ 87.

[14] Section 1607.3 ofthe EEOC Guidelines provides:

> "The use of any test which adversely affects hiring, promotion, transfer or any other employment or membership opportunity of classes protected by title VII constitutes discrimination unless: (a) the test has been validated and evidences a high degree of utility as hereinafter described, and (b) the person giving or acting upon the results of the particular test can demonstrate that alternative suitable hiring, transfer or promotion procedures are unavailable for his use."

school district which imposes a sweeping prohibition against unwed parents of illegitimate children must, under Title IX as well as Title VII, establish that such a rule is justified by business or educational necessity. Drew has not made such a showing (see pp. 21-29, *infra*), and it is unlikely that any employer could do so.

Because Title VII and Title IX are at least as broad as constitutional bars against race and sex discrimination and because these statutory provisions are likely to control any future cases presenting similar facts, this Court may appropriately avoid the manifold constitutional issues presented here and dismiss its writ as improvidently granted on the authority of *Rice* v. *Sioux City Cemetery*, 349 U.S. 70 (1955). In *Rice*, plaintiff contested the constitutionality of an Iowa decision which permitted cemeteries to deny burial to noncaucasians. The case came to this Court in the immediate wake of *Brown* v. *Board of Education*, 347 U.S. 483 (1954), and presented complicated questions of "state action" as well as the issue whether the Fourteenth Amendment condemned the practice complained of. Initially, this Court affirmed the Iowa Supreme Court's decision by an equally divided vote. On petition for reconsideration, however, the Court focused for the first time on a supervening Iowa statute which, while not applicable to the case at bar, would substantially diminish the public importance of the case. Paying special heed to the "Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion" and the impact of the supervening law, the Court determined to vacate its judgment and dismiss the writ as improvidently granted. *Rice* v. *Sioux City Cemetery*, *supra*, 349 U.S. at 74.

Dismissal of the writ is all the more appropriate here, for there is no conflict among the circuits, and the judgment below is consistent with the result that would be obtained under federal statutory law.

B. Alternatively The Judgment Below Should Be Affirmed On The Basis Of The Supervening Regulations Implementing Title IX.

In the event the Court should determine not to dismiss its writ as improvidently granted, we would urge the Court to affirm the decision below on the basis of the supervening regulations implementing Title IX. While these regulations were not extant at the time of either decision below, the facts and findings of the District Court bring the case squarely within the proscriptions of the regulations. Thus, the District Court concluded that the "essentially discriminatory effect of the Drew policy upon unmarried women is inescapable" and amounted to a suspect classification which was neither justified by a compelling state interest nor shown to be necessary for the operation of an educational program (Pet. App. 36-37).

Commencing at least with *United States* v. *Schooner Peggy*, 5 U.S. (1 Cranch) 64, 69 (1801), this Court has adhered to the principle that "if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied . . . [and] in great national concerns . . . the court must decide according to existing laws. . . ." In *Thorpe* v. *Housing Authority*, 393 U.S. 268, 281-82 (1969), this Court held that supervening agency regulations, like constitutional, statutory or judicial changes in the law, must be applied by the reviewing courts unless such application would constitute a "manifest injustice" (*id.* at 282).[15] See also *California Bankers Ass'n.* v. *Schultz*, 416 U.S. 21, 49 n.21 (1974); *Bradley* v. *Richmond School Board*, 416 U.S. 696, 714-17 (1974).

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[15] In *Thorpe* this issue arose because the Supreme Court of North Carolina refused to apply retroactively to petitioners' case a circular issued by the Department of Housing and Urban Development governing eviction procedures. 393 U.S. at 281.

HEW's regulations implementing Title IX represent a supervening change in the law of sex discrimination and an appropriate standard for affirming the judgment below. Here, as in *Lau* v. *Nichols*, 414 U.S. 563 (1974), it is unnecessary for the Court to reach the constitutional issues because the school district, as a recipient of federal funds, is barred by federal regulations from pursuing the policy in question (*id.* at 566; see note 12, *supra*). Accordingly, if the writ of certiorari is not dismissed as improvidently granted, the judgment below should be affirmed on the basis of the regulations implementing Title IX.

III. DREW'S RULE IS UNCONSTITUTIONAL BECAUSE IT UNNECESSARILY AND UNDULY INTRUDES UPON RESPONDENTS' PRIVACY AND LIBERTY AND IS NOT JUSTIFIED BY SUBSTANTIAL EDUCATIONAL CONSIDERATIONS.

In this section we show that the Constitution bars state action which unduly intrudes upon an individual's sexual, marital and familial relations. In determining whether such intrusions are undue and therefore unconstitutional, this Court has required the state to demonstrate that any rule intruding upon these constitutionally protected interests is justified by substantial educational considerations and is not overbroad. As we show below, Drew's rule and the alleged justifications for that rule do not meet these constitutional criteria.

A. The Constitutional Standard Is That The Rule Must Be Supported By Substantial Justification And Be Narrowly Drawn.

The decisions of this Court establish that one's sexual, marital and familial relations are intensely personal interests which are constitutionally protected by (1) the right of privacy "implicit in the concept of ordered liberty," and (2) the explicit guarantee of liberty in the

Due Process Clause of the Fourteenth Amendment. Included within the protective ambit of these precepts are, as the Court said in *Roe* v. *Wade*, 410 U.S. 113, 152 (1973), "activities relating to marriage, *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967); procreation, *Skinner* v. *Oklahoma*, 316 U.S. 535, 541-42 (1942); contraception, *Eisenstadt* v. *Baird*, 405 U.S. [438] at 453-54 [1972]; *id.* at 460-463, 465 (White, J., concurring in result); family relationships, *Prince* v. *Massachusetts*, 321 U.S. 158, 166 (1944); and child rearing and education, *Pierce* v. *Society of Sisters*, 268 U.S. 510, 535 (1925); *Myer* v. *Nebraska*, [262 U.S. 390 (1923)] *supra*." Twice, the Court has noted that "there is a right 'to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.'" *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632, 640 (1974), quoting *Eisenstadt* v. *Baird*, 405 U.S. 438, 453 (1972).

Before a State may intrude or impinge upon these personal liberties it must show, at a minimum, a substantial justification for the intrusion,[16] and both *Wade* and *LaFleur* make clear that, if the State intrudes upon the individual's sexual, marital, and familial relations, its rules or laws must be narrowly drawn. See also, *Turner* v. *Department of Employment Security and Board of Review of the Industrial Commission of Utah*, 44 U.S.L.W. 3298 (decided Nov. 17, 1975). Relying upon a substantial body of case law,[17] the Court in *Wade* said

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[16] In *Wade*, the Court held that the State must demonstrate a compelling state interest in order to justify any intrusion upon the female's decision to bear or abort a fetus. *Roe* v. *Wade*, 410 U.S. at 155.

[17] The Court cited *Griswold* v. *Connecticut*, 381 U.S. 479, 485 (1965); *Aptheker* v. *Secretary of State*, 378 U.S. 500, 508 (1964); *Cantwell* v. *Connecticut*, 310 U.S. 296, 307-08 (1940); and *Eisenstadt* v. *Baird*, 405 U.S. 433, 460, 463-64 (1972) (White, J., concurring).

that it is not enough that the State's interest be compelling: its "legislative enactments must be narrowly drawn." *Roe* v. *Wade*, 410 U.S. 113, 155. In *LaFleur*, the Court observed that the school district's pregnancy rules "surely" related to a legitimate state interest—insulating the children from a potentially incapacitated pregnant teacher. "But the question is whether the rules sweep too broadly. See *Shelton* v. *Tucker*, 364 U.S. 479. That question must be answered in the affirmative. . . ." *Cleveland Board of Education* v. *LaFleur*, 414 U.S. at 644.

As we read *LaFleur*, it establishes a standard for protecting privacy and liberty interests of teachers which falls between the traditional due process standard and the compelling interest standard of *Wade*. In *LaFleur*, the school boards urged that two state interests justified their pregnancy rules—(1) continuity of instruction, and (2) insulation of the classroom from teachers who are incapacitated by pregnancy. Both goals were held to be "legitimate" educational goals (414 U.S. at 641, 643). In pursuit of these goals, the school districts required that pregnant teachers terminate their service during the fifth or sixth month of pregnancy. As to the reasonableness of the cutoff dates, there was, in the Court's words, a "plethora of conflicting medical testimony" and the Court assumed arguendo that "at least some teachers become physically disabled from effectively performing their duties during the latter stages of pregnancy" (*id.* at 643-44).

The rules of the school boards would have satisfied traditional due process standards.[18] See *Richardson* v. *Belcher*, 404 U.S. 78 (1971); *Flemming* v. *Nestor*, 363 U.S. 603, 611 (1960). But the cases involved an intrusion into the teacher's sexual, marital, and familial

[18] Mr. Justice Powell's concurring opinion concluded that the rules did not satisfy the traditional equal protection standard. *Cleveland Board of Education* v. *LaFleur*, *supra*, 414 U.S. at 656.

life. See *Weinberger* v. *Salfi*, 422 U.S. 749, 771-72 (1975) (*LaFleur* distinguished on grounds that basic human liberty was at stake). Because these constitutionally protected interests were at stake, the Court held that the due process standard not only barred arbitrary and capricious rules but also rules which "needlessly . . . impinge upon this vital area of a teacher's constitutional liberty" (414 U.S. at 640). The Court concluded that the overbroad pregnancy rules before it were required to be, but were not, justified by evidence in the record: "The Fourteenth Amendment requires the school boards to employ alternative administrative means, which do not so broadly infringe upon basic constitutional liberty, in support of their legitimate goals" (*id.* at 647).

Clearly, under *LaFleur's* approach to due process, it is not sufficient that rules which intrude upon a teacher's sexual, marital, or familial life be free of bad faith and irrationality. They must be supported by substantial countervailing considerations which justify the intrusion, or the school authorities must proceed on a case-by-case basis. The Court's reasoning in *LaFleur* and its reliance on *Shelton* v. *Tucker*, 364 U.S. 479 (1969), establish that "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose" (*id.* at 488).

B. Petitioners Have Not Demonstrated That The Rule Is Justified By Substantial Educational Considerations And Their Rule Is Overbroad.

The superintendent formulated his rule in the belief that all unwed parents of illegitimate children are immoral (Pet. App. 8-9 & n.7). Respondents expressly

abandon this purported justification for the rule and urge, as they did in the lower courts, that all unwed parents of illegitimate children are improper role models and that the rule helps to deter schoolgirl pregnancies (Br., 3-4, 11, 23 & n.7). Both lower courts rejected Drew's role model theory as "highly improbable, if not speculative," and "quite implausible" (Pet. App. 13, 33). The Court of Appeals also noted that the rule could not be salvaged on the ground that "the presence of unwed parents in a scholastic environment materially contributes to schoolgirl pregnancies [because that claim] is without support, other than speculation and assertions of opinion, in the record before us" (*id.* at 13).

As these findings and conclusions imply, Drew has failed to demonstrate that its rule is justified by substantial educational considerations. Indeed, it appears that Drew's rule stands in splendid isolation, for Drew has not shown that any other school district has formulated a similar rule and the experts were unaware of such rules (p. 7, *supra*). Moreover, as we show below, Drew's rule is overbroad and its role model theory does not support the rule, much less justify intruding upon the personal freedoms of school personnel. The rule also creates serious adverse educational and social consequences for more than one-third of the children of Drew who were born out of wedlock. Finally, as we show, there are means less drastic than the rule for obtaining the professed goals of the school district.

1. *Petitioners' "Role Model" Theory Is Inadequate* To Support Their Rule.

In support of their rule, petitioners advance their own "role model" theory. Educators use the terms "modeling and observational learning" interchangeably to refer to "behavior that is learned or modified as a result of observing the behavior of others. The person whose behavior is observed and imitated is the model." [19] In the case at bar the experts sensibly agreed that a child must perceive or know of a model's behavior before the child can imitate that behavior. (Clark, 3-8, 15-16, 20-21; Gordon, 3-9, 11-12, 26-28; Samuda, 2-7, 12-13, 26; Van Den Haag, 4-6, 10-11, 13, 16, 29-30, 33-41, 44; Stancil, 88-92. Cf. Buchanan, 27-31, 53-54).

Drew's rule is not confined to teacher behavior that is observed by or even known to the child. The rule is neither limited to unwed persons who are teaching in the classroom during pregnancy, nor to persons whose status as unwed parents otherwise may be readily detectable. Rather, the rule reaches all persons who have conceived illegitimate children including parents whose children have grown and moved away, females who bore their children outside the community and placed them for adoption, males who sired children and did not rear them, and females who bore children and subsequently married or chose to rear them in a family setting with grandparents and brothers and sisters of the parent. In short, petitioners would banish from the classroom every parent of an illegitimate child irrespective of whether, from the students' standpoint, such a person is a "model" for unwed parenthood.[20] Both lower courts properly rejected the role model justification for Drew's rule because the rule barred from employment persons whose behavior would not be revealed to the students and thus could not be imitated (Pet. App. 13, 33).

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[19] Sarason, *et al.*, Modeling and Role-Playing in the Schools: A Manual with Special Reference to the Disadvantaged Student, Human Interaction Research Institute, Los Angeles, Cal. (April 1973) at 6.

[20] The rule is overbroad in another respect. It applies not only to persons who work directly with the children in the classroom, but also to office secretaries, cafeteria workers, presidents of the PTA's, volunteer workers in the school and perhaps bus drivers and janitors (Pettey, 5-6, 8-9, 17, 19, 21-23; Pet. App. 23, n.8).

Furthermore, petitioners' role model theory is dubious even when the student knows that the teacher is an unwed parent of an illegitimate child. Petitioners' theory is that, irrespective of what the teacher says and does in the classroom, the student's sexual and family values may be shaped by his or her knowledge of unobserved conduct—*i.e.*, that the teacher conceived a child out of wedlock. Dr. Ronald Samuda, Assistant Dean for Program Development and Associate Professor of Education at Columbia Teachers College, testified that traditional views of role modeling are that "children learn when they see a prestigious person doing something in the classroom or wherever and when they see that person being reinforced or being rewarded [21] for [acting in a particular way]. Children then would tend to imitate those acts" (Samuda, 3, 12-13). For example, where schoolchildren observe their teacher washing her hands before the morning break for milk and cookies, they may be expected to imitate that conduct, at least if told to do so. But under Drew's rule, as Dr. Samuda testified, "it seems to me that we are talking about . . . an in-

[21] There are many studies showing that reinforcement (observed rewards or punishment for the model) is generally necessary in order to drive home to the child the lessons that are being portrayed by the model. Frayer, *et al.*, Modeling as a Technique for Promoting Classroom Learning and Pro-Social Behavior, Wisconsin Univ., Madison. Research and Development Center for Cognitive Learning (October 1972) at 8, 15; Sarason, *et al.*, Modeling and Role-Playing in the Schools: A Manual with Special Reference to the Disadvantaged Student, Human Interaction Research Institute, Los Angeles, Cal. (April 1973) at 6-8, 13, 42, 48; S. Thomas, Modeling and Imitation Learning in Young Children: An Abstract Biography, ERIC Clearinghouse on Early Childhood Education, Urbana, Ill. (April 1973) at 7-8; A. Prakash, *Effect of Modeling and Social Reinforcement on the Racial Preferences of Children*, 1973 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY (Abridged version, Ph.D. Dissertation, University of Montana); J. Bryan, *Model Affect and Children's Imitative Altruism*, 42 CHILD DEVELOPMENT 6 (December 1971) at 2061, 2065; Grusec, *et al.*, *Model Nurturance, Demand Characteristics of the Modeling Experiment, and Altruism*, 14 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 4 (1970) at 214.

ferential value system. And in my opinion, if there is no evidence of overt behavior and of the proselytizing of extramarital sex, then I can see no correlation whatsoever between being an unwed mother and being a competent teacher" (*id.* at 13).

Indeed, petitioners' theory is based upon pure speculation rather than studies or other proof. The theory assumes, without supporting studies, that a teacher is a model for family values and sexual mores (cf. Gordon, 12). Furthermore, petitioners' theory assumes that students will indiscriminately choose to have premarital relations because they know that a teacher whom they admire has had them. A recent study, to the contrary, concludes that "The child does not indiscriminately imitate all responses by all potential models. Ambivalence in identification may be observed when he [the child] reaches the point in development at which he can respond cognitively to the identifications he has formed." Sarason, *et al.*, *supra* note 19, at 11.[22] Stated more plainly, this study rejects Drew's "monkey-see, monkey-do" approach and recognizes what every parent knows—that postpubescent children have independent powers of thought and discernment. See A. W. Kay, MORAL DEVELOPMENT (1969), pp. 96-97. See also the opinion of the District Court, Pet. App. 33.

2. *The Stigmatizing Effect of Petitioners' Rule Upon the Illegitimate Children of Drew and their Parents Outweighs the Hypothetical Risk that a Student may be Adversely Influenced by the Purported Model Effect of an Unwed Parent.*

In our view, the speculative nature of the superintendent's role model theory does not remotely approach the substantial justification that might warrant intrusion

[22] See also J. Getzels, *The Acquisition of Values in School and Society*, THE HIGH SCHOOL IN A NEW ERA. (1958), p. 147.

upon the liberty and privacy interests at issue here. In testing the substantiality of the justification offered in support of Drew's rule, the Court appropriately may consider the serious educational disadvantages which, according to this record, flow from the rule.

Eighty percent of the children in the public schools of Drew are black (Pet. App. 24). Approximately 44.6 percent of these black children were born out of wedlock[23] (Br., p. 27); yet the superintendent evidently never considered the adverse educational impact of a rule which banishes the parents of all illegitimate children from teaching, working in the school cafeteria, working in the school office, volunteering to do school work, serving as PTA president, and perhaps even serving as a bus driver or janitor (Pettey, 21-23).[24]

By disqualifying from school employment all persons who have sired or borne an illegitimate child, the rule stigmatizes all illegitimate children in Drew and their parents. As one black resident of Sunflower County observed, the rule conveys to the illegitimate child "that it, too, is not fit" (Hamer, 81). The rule also teaches the child that its parents are unfit and discourages, if not bars, such parents from working closely with the school and participating in or publicly supporting school

[23] The superintendent stated that the percentage of whites born out of wedlock was approximately one-half as great as the percentage of blacks born out of wedlock (Pettey, 27). Petitioners state that 35.2 percent of the births in Sunflower County in 1971 were out of wedlock (Br., p. 23).

[24] While the record is replete with the superintendent's moral precepts and role model theory, it is bereft of evidence showing that the superintendent ever considered whether it would be more damaging to the children of Drew to bar all unwed parents from school-related positions than to take the hypothetical risk that a student might be influenced to have premarital relations because his or her teacher has had them.

activities. These considerations led Dr. Kenneth Clark to conclude that the rule

> "is a dehumanizing rule in that it imposes upon human beings a stigma which to me is absolutely unnecessary, except in terms of cruelty. It imposes a stigma, an unnecessary stigma, on the children who are the products of . . . the unwed situation of the mother, and it imposes a discriminatory cruelty upon the mother. I see no other function for such a rule. It certainly has no intrinsic educational function. . . . Is has, as far as I can see, only a dehumanizing function" (Clark, 26-27).

In sum, the rule denigrates more than one-third of the children in the Drew school system and their parents to the inevitable detriment of sound education, and this consequence of the rule should be taken into account by the Court in determining whether the rule is justified by substantial considerations of educational policy.

3. *There are Less Drastic Means for Achieving the School District's Goals.*

Drew urges that its rule is justified because it will "help to decrease" the rate of schoolgirl pregnancies and illegitimate births in the school district (Br., pp. 4, 23 & n.7). There are, however, much less drastic means available to accomplish this end than barring all progenitors of illegitimate children from the classroom. Just as Drew devotes a specified number of hours each year to the subject of alcoholism and is encouraged to do the same with respect to drug abuse (Miss. Education Code §§ 37-13-25 through 35; 37-13-43 through 51), so too, it may deal with the social and/or moral problems associated with premarital relations by youngsters.[25] Indeed, it is more

[25] The portion of the record available to us does not indicate whether Drew provides cognitive training in sex education and morals (see note 1, *supra*).

reasonable to deal with these problems through individual and group counselling or as subjects for classroom instruction than to rely upon the modeling effects of a silent corps of "virtuous" teachers.[36]

4. *There are no Reasonable Limits to the Role Model Theory if It Extends Beyond Classroom Behavior and Open and Notorious Conduct.*

Amicus' greatest concern with this case arises out of the extraordinary reach that petitioners assign to role modeling. Petitioners do not claim that any of the teachers who are parents of illegitimate children have mentioned this aspect of their private lives in the classroom, much less proselytized their classes. Nor have petitioners shown that any school children knew that their teachers were the parents of illegitimate children, though this knowledge is vital to their thesis that children will emulate their teachers. Instead, petitioners would make relevant, indeed critical, teacher conduct which is neither open and notorious nor connected with school activities.

Under petitioners' role model theory, any private conduct of a teacher which does not accord with the moral standards professed by the school authorities would constitute grounds for disqualification from school employment. Drew's concept of role modeling would invite the board and the superintendent to scrutinize the single teacher's social life, the married teacher's matrimonial

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[36] In a footnote Drew quotes testimony suggesting that unwed parents of illegitimate children may either explicitly encourage illegitimacy and premarital relations or be ineffectual in discouraging such phenomena (Br., p. 7 & n.5). These concerns are particularly suited to examination in the employment interview process. Rather than barring all unwed parents, an interviewing officer could readily inquire of the applicant how he or she would handle discussions or questions concerning illegitimacy and premarital relations and evaluate the answer.

difficulties, and a host of personal decisions regarding, *inter alia*, smoking, use of alcoholic beverages and lawful abortion. To sanction petitioners' theory would permit an unacceptable encroachment upon the personal liberties of millions of teachers in our nation's public schools.

5. *Summary*

Drew has not presented a substantial justification for its rule. The rule is overbroad and unnecessarily intrudes upon the liberty and privacy of school personnel. To the extent that Drew seeks to deter schoolgirl pregnancies, there are less drastic and more effective means for accomplishing that end than enforcing a rule which intrudes upon the private lives of teachers and stigmatizes more than one-third of the children of Drew and their parents. To the extent that Drew conclusively presumes that all unwed parents of illegitimate children are improper role models, Drew has espoused a theory of role modeling which is unreasonable.

Drew's theory of role modeling does not focus upon the teacher's classroom behavior or conduct which is open and notorious. Rather, it focuses upon the private sexual, marital and familial relations of the teacher, and assumes that these matters will be known to the students and will be indiscriminately imitated by them. Such speculation does not constitute the substantial justification which the Constitution requires as a precondition for invading the privacy and liberty of teachers.

CONCLUSION

For the reasons set forth in Section II of this brief, the Court should dismiss its writ of certiorari or affirm the judgment below on the basis of the supervening regulations which implement Title IX of the Education Amendments of 1972. In the event that the Court does neither, it should affirm the judgment below because Drew's rule unconstitutionally intrudes upon respondents' liberty and privacy.

Respectfully submitted,

STEPHEN J. POLLAK
MARTIN J. FLYNN
RICHARD M. SHARP
734 Fifteenth Street, N.W.
Washington, D.C. 20005

DAVID RUBIN
1201 Sixteenth Street, N.W.
Washington, D.C. 20036

Attorneys for Amicus Curiae
National Education Association

Of Counsel:

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D.C. 20005